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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 404.

CONSOLIDATED CAUSES.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of ALBERT B. SHULTZ, deceased, PERRY E. WURST, LEWIS G. HARRIMAN, FREDERICK B. COOLEY, GEORGE H. CHISHOLM, HARRY L. CHISHOLM, RALPH HOCHSTETTER, ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON, HENRY L. BOGERT, JR., GILMER SILER, Individually as well as Co-Partners with JAMES P. MAGILL and MAURICE H. BENT, doing business under the firm name and style of Eastman, Dillon & Company,

Respondents.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of ALBERT B. SHULTZ, deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COMPANY, as Co-Executor under the Last Will of ALBERT B. SHULTZ, deceased, THOMAS CANTWELL and GEORGE P. REA,

Respondents.

BRIEF OF RESPONDENTS, THOMAS C. EASTMAN, *ET AL.* (EASTMAN, DILLON & CO.), IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Petitioners' summary statement of the case (petition, pp. 4-29) is inadequate and misleading. It virtually ignores

the findings of fact made by the District Court (R. 202-45), and it does not accurately describe the position occupied by the respondents, Thomas C. Eastman, *et al.*, in respect to the transactions in controversy. A brief statement of the facts involved is, therefore, necessary to a proper determination of the petition.

Statement of the Case.

The respondents Thomas C. Eastman, *et al.* are parties only to the first of these two consolidated actions. In 1928, which is the time of the transactions complained of, said respondents were engaged as co-partners in the investment banking business under the firm name and style of Eastman, Dillon & Co. (hereinafter referred to as "Eastman Dillon") with offices, among other places, in New York City and Chicago (R. 149-50, 158, 204). The respondent Maurice H. Bent was the resident partner in charge of Eastman Dillon's Chicago office and George N. Buffington, an employee (named but not appearing as a defendant), was the head of its new business department (R. 149-50, 158, 204).

The Evidence.

Eastman Dillon first came into contact with Houde Engineering Corporation (hereinafter referred to as "Houde") in the early part of January, 1928. At that time, Cortelyou,[1] the then Secretary of Central Trust

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[1] Although Cortelyou was originally named and appeared as a party defendant, petitioners abandoned their charges against him on their appeal to the Circuit Court of Appeals (R. 2-3, 248).

Company of Illinois, after first obtaining the consent of the decedent and other parties in interest, approached Buffington of Eastman Dillon and through him invited that firm to join with Manufacturers & Traders Trust Company (hereinafter referred to as "the Bank") and Central Trust Company in a survey or investigation which was then being conducted of Houde's operations (R. 207, 923-4, 926, 930, Ex. P-441). The purpose of this survey was to analyze the respective advantages and disadvantages of a recent influx of new business which Houde was receiving from the Ford Motor Company and to determine whether a refinancing of Houde was feasible[2] (R. 206, 922, 1090-1, 1095-6, 1227). Cortelyou testified that Eastman Dillon was asked to explore the possibilities of some form of public financing for Houde because neither the Bank nor Central Trust Company had participated to any extent in the public offering of stocks, and for the reason that Eastman Dillon was actively engaged in that line of business and was familiar with the automobile accessories field (R. 923-4). He also testified that Buffington, when first approached, was

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[2] Prior to the commencement of the survey, namely, during the years 1925, 1926, and 1927, the earnings of Houde had shown a steady decline (R. 206, 1088-9, Exs. P-21, P-22). At the same time, Houde also suffered from a chronic lack of working capital (R. 615, 1085, 1306), with the result that numerous efforts were made by the owners, including decedent, either to sell or to refinance the company (R. 206, 707-8, 710-5, 730-2, 1002, 1043-4, 1306-7, 1310-1, Exs. P-27, P-31, P-33). The advent of the new Ford business in the Fall of 1927, accordingly, found Houde poorly equipped in the way of working capital to effect the rapid expansion of its plant and production facilities made necessary by such business (R. 206, 1308-9). It was in the light of this situation that the owners of Houde requested the Bank, as the company's commercial banking connection (R. 205, 1084), to make the survey in question. Since it was anticipated that new capital would be required, the Bank enlisted the aid of Central Trust Company, which had participated in the previous efforts of the owners to sell the company (R. 207, 1085-6, 1090-1, 1383-4).

not particularly interested and that it was only after several calls that Buffington finally consented to look into the matter (R. 924).

The survey was completed early in February, 1928, and a proposed plan of refinancing for Houde was subsequently formulated and set up (R. 207, 785-6, 795-6, 842, 925-7, Exs. P-20, P-454). This proposal was submitted to the decedent and other Houde stockholders but was rejected by them for the reason that they preferred, for the time being at least, to assume the risk of financing Houde's production costs through the medium of bank loans, rather than to resort to public financing (R. 207, 927, 934-5, Ex. P-448).

Thereafter, both Eastman Dillon and Central Trust Company maintained a continuing interest in the Houde situation (R. 207, 927-8) and Buffington exchanged information with Cortelyou and kept himself informed generally as to the status of the matter (R. 624-5, 939, 1385, 2044-5, Exs. P-375-P-382). By July, 1928, it became apparent that no public financing would be undertaken by Houde and the matter, so far as Eastman Dillon was concerned, was dropped.

Having learned during the course of the investigation in February, 1928, of the desire of the Houde owners, including decedent, to dispose of their stock at a satisfactory price, Buffington, in the latter part of July, 1928, approached Mr. Fred Glover, President of the Timken-Detroit Axle Company, in an endeavor to interest him in purchasing the Houde business (R. 207, 925, Exs. P-54, P-55, P-441). He later made similar efforts to interest the Bendix Company and Borg-Warner Company, both of which concerns, like the Timken-Detroit Axle Company, were engaged in the automobile accessory business and logical buyers of Houde (R. 207, 2075, 2091-2, 2094, Exs. P-392, P-395). These negotia-

tions were undertaken by Buffington in the hope that if a purchaser of the Houde business could be found, such purchaser might wish to finance out all or part of the purchase price through the medium of some stock offering in which Eastman Dillon might be permitted to participate (R. 2060).

Buffington was unable to elicit any real interest on the part of his prospects without being able to give them a definite price at which Houde could be bought. He accordingly communicated with Rea and suggested that an option or definite price be secured from the Houde stockholders (R. 208). In this connection, Buffington testified (R. 2059-60):

> "Q. Now Mr. Buffington, did you suggest that the M. & T. Bank obtain an option from the stockholders of the Houde Engineering Corporation? A. I believe I did.
>
> Q. And when did you make that suggestion, sir? A. It was about the time that it looked as though I might interest Mr. Glover of the Timken-Detroit Axle Company of Detroit in purchasing the business.
>
> Q. And did you have discussions along these lines with Mr. Glover? * * * A. I believe that in my discussions with Mr. Glover, he wanted to know a definite price at which he could purchase the business, if he was interested, for a given period of time, and it was with that in mind, my best recollection is, that I asked Mr. Rea that he secure an option.
>
> Q. And did you also discuss with Mr. Glover the financing out of all or any of the purchase price of the Houde stock? A. My best recollection is that I did, because that would be the reason our company was interested in the sale, because our business was that of distributing securities."

The above testimony of Buffington is fully corroborated by that of Rea (R. 1386-8, 1474-5) and is also confirmed by

the contemporaneous correspondence[3] (Exs. P-56, P-57, P-59).

Acting on Buffington's suggestion, Rea, in August, 1928, entered upon a series of discussions with decedent in an endeavor to obtain an option or a definite price at which he and his fellow stockholders would be willing to sell their stock. However, these discussions came to naught by rea-

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[3] Under date of July 27, 1928, Buffington wrote Rea, stating (Ex. P-56):

> "I expect to talk to my people in Detroit on the telephone tomorrow, to see if it will be possible to arrange a meeting in Buffalo the early part of next week. I can assure you that this is more than a passing interest with my friend but I, of course, do not know how far he would go with Mr. Schultz, if he is projecting his ideas of price entirely on the last three months earnings. However, I am convinced that this is a situation which warrants further discussion by the principals."

Rea, in reply, wrote on August 13, 1928, in part, as follows (Ex. P-57):

> "Have had a preliminary conversation this morning with Mr. Schultz and find that his attitude is, in general, as I reported it to you. I do not think there is any question but what a cash offer of a price that seems reasonable to him could purchase the business in that manner."

And again on August 31, 1928, Buffington wrote another letter to Rea, saying (Ex. P-59):

> "Following my telephone conversation with you a week ago Friday, I talked with Mr. Glover again, and he seems quite anxious to have certain information which I have been unable to give him, regarding the Houde Engineering Company.
>
> "As I told you when I originally talked to you, they have one or two other plans in mind on which they are working, and Mr. Glover intimated to me that one situation had progressed to the point where they would have to make a decision in the near future. I appreciate fully the way you have handled the matter to this point and realize the wisdom in not appearing anxious with Mr. Schultz, *but I do believe that if possible we should be in a position to discuss something quite definite with Mr. Glover within the next week or ten days, if we expect him to become actively interested in acquiring the business.*" (Italics ours.)

son of decedent's unexpected departure for Europe on September 6, 1928 and his refusal, prior to that time, to discuss a definite price because of the absence of the respondent G. H. Chisholm (Exs. P-57-P-62).

Upon the return of Chisholm to Buffalo later in September, negotiations were carried on first between Rea and Chisholm and later between Rea, Chisholm and two other Houde stockholders, namely, B. D. Shultz, the decedent's brother, and James Scully, which culminated in the execution of the option agreement, Exhibit P-98, on September 26, 1928 (R. 208-10). The facts in connection with these negotiations are fully set forth in the brief of the other respondents and need not be reiterated here. Suffice it to say that, contrary to the allegations of the complaint, Eastman Dillon did not participate in these negotiations and made no representations whatever. This was affirmatively found as a fact by the District Court (R. 211), and the finding is supported by the testimony of James Scully and B. D. Shultz (R. 329, 356), as well as that of Rea and G. H. Chisholm (R. 734, 1311-2, 1431).

Upon being informed by Rea that the Houde stockholders had evidenced their willingness to sell their stock at a price of $4,000,000, plus accruals, Buffington continued in his efforts to interest Borg-Warner, Bendix and the Timken-Detroit Axle Company in the purchase of the business (R. 213, 1392, Exs. P-393, P-395, P-398, P-399). By October 3, 1928, however, all three of these companies had indicated their definite disinterest in the matter (R. 213, 1099, 1393, 1476-7), and Buffington so advised Rea (Ex. P-403).

The subsequent negotiations which were initiated by Rea, Harriman and Wurst on the part of the Bank, and which resulted in the sale of the Houde stock to Mr. Fred

B. Cooley, were carried on by them independently of Eastman Dillon and Buffington. The efforts to interest Cooley came about by reason of and after the receipt by Rea of Buffington's wire of October 3, 1928, advising that his people had "definitely declined business" (R. 1397, Ex. P-403).

Eastman Dillon took no part whatever in the negotiations with Cooley or the transactions by which the sale of the Houde stock was ultimately consummated (R. 213, 216, 1434, 2147). Eastman Dillon did not learn of the Cooley purchase until October 15, 1928, some four or five days after Cooley had agreed to buy the stock and the option had been exercised (R. 216-7, 2093, Exs. P-402, P-404), and, unlike the decedent, it was at no time informed or aware that Cooley was a director of the Bank (R. 237, 2152) and that his purchase was financed by the Bank (R. 216, 227, 2151). It likewise was without any knowledge of, and had no connection with, the negotiations conducted by and on behalf of Cooley on October 12, 1928 with the representatives of the General Motors Corporation (R. 218-9).

Following Cooley's purchase of Houde, consideration was given by him to the possibility of arranging some form of public financing (R. 222, 1122-3). Efforts were accordingly made by Rea to revive the interest of Buffington, with the result that numerous discussions ensued in which Central Trust Company, through Cortelyou, also participated (R. 222, 688, 951-2, 2147). While various plans for financing were considered (R. 222, 786-7, 853, 1164), they never proceeded beyond the discussion stage (R. 2147). By October 31, 1928, Eastman Dillon had decided that any financing of Houde was at that time unwise, and flatly and finally

declined to go forward therewith (R. 228, 949-50, Ex. P-74).[4]

The syndicate which was thereafter formed by Cooley to acquire the Houde stock (R. 228, 1151, 1155, 1412-3, 1953) was in no way participated in by Eastman Dillon and it at no time shared or had any interest, direct or indirect, in the profits ultimately realized therefrom by the syndicate members (R. 230).

Sometime towards the middle of October, 1928, Buffington, through a mutual acquaintance, had met a Mr. Claire Barnes, who was the then head of the Oakes Products Corporation and who had, shortly prior thereto, consummated a successful public offering of stock of the Hershey Corporation through the investment banking firms of Harris, Small & Co. and Paul H. Davis & Co. (R. 235, 2063-5, 2079, 2081-2, 2164). In the latter part of October, 1928, Barnes, as a result of this earlier contact with Buffington, indicated an interest in Houde. Buffington accordingly communicated this fact to Rea in his letter of October 31st (without, however, mentioning Barnes' name) (Ex. P-74), and, upon learning from Rea of the willingness of the then owners of the Houde stock to discuss a sale (Ex. P-75), wrote Barnes on November 2, 1928, in part, as follows (Ex. P-78):

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[4] Buffington communicated this information to Rea by letter of October 31, 1928, reading, in part, as follows (Ex. P-74):

> "I delayed writing you until today, thinking that because of your recent negotiations with Bruce (Cortelyou) it was proper for him to tell you that Eastman Dillon & Company considered it unwise to offer publicly the Houde Engineering Company financing at this time.
>
> "I regret exceedingly that our decision was delayed, but can assure you that we arrived at this conclusion after a great deal of very careful thought. As I told you many times, this financing was of a great deal of interest to us, but at the same time I could not bring my associates to feel that we were justified in offering the stock in view of the short earning record and because of unsettled market conditions."

"We had negotiations with the Company to provide for financing out a part of the purchase price, but for reasons which I told you about this morning, nothing was concluded and so far as I know it is the intention of Mr. Cooley and his associates to operate the business at the present time. I believe that it may be possible to work out a deal whereby Mr. Cooley and his associates would take stock in another Company properly financed for their present holdings in the Houde Company.

"I believe that our interest might best be served if you would give Harris, Small & Company the facts as I have outlined them to you and suggest that they contact with Mr. George P. Rea, Vice-President of the Manufacturers and Traders Peoples Trust Company, with whom we had our negotiations.

"As I told you this morning, there are two weaknesses in this situation which we did not like. One is the Ford contract and the other fact, which I would not like to disclose to Mr. Rea, is that the management at the present time is not adequate in our judgment to insure an increasing volume of business. I am sure that it would be unwise in the original instance to disclose any concern on our part about the Ford business as I believe that this is a subsequent step.

"In disclosing this information to you, I understand that in the event a deal is consummated Eastman, Dillon & Company, Harris, Small & Company and Paul H. Davis & Company will have an equal interest in the financing. * * *"

On the same day, to wit, November 2, 1928, Buffington for the first time apprised Rea of Barnes' name and identity (R. 234-5, 593, 670, 1122, 1491-3, 2083, Exs. P-77, P-437), and later made arrangements for Barnes and his associ-

ate, Allington, a partner in the firm of Harris, Small & Co., to come to Buffalo for the purpose of looking into the Houde situation with a view to a possible purchase of the Houde stock (R. 235, 2114-5, 2146, Exs. P-419, P-420, P-421, P-422).

On November 14, 1928, Barnes and Allington arrived in Buffalo and discussed the matter with Rea (R. 233, 673, 676-7). They left that night for Chicago, but before doing so, telephoned Melville C. Mason, their Detroit counsel, and instructed him to form a new corporation for the purpose of acquiring the Houde stock, if and when the same should be purchased by Barnes or his bankers, Harris, Small & Co. (R. 235-6, 1607, 1609, 1616). The next day Barnes and Allington arrived in Chicago where they met with Buffington and Mr. Davis of Paul H. Davis & Co. and discussed the matter of the purchase of the Houde stock and the prospective capitalization and financial structure of the proposed new company which was being formed by Mason (R. 1616, 2078-9, 2080-1, 2118, 2122, 2123, 2149, 2151). As a result of this conference, it was understood that, in the event Barnes consummated a purchase of the Houde stock, Eastman Dillon, Harris Small & Co. and Paul H. Davis & Co. would participate equally in any public financing (R. 2118, 2125). Prior to this meeting of November 15th, Buffington did not know that Barnes was going to purchase the Houde stock (R. 235, 2146-7) and had not discussed the matter with any represenative either of Harris, Small & Co. or of Paul H. Davis & Co. (R. 242, 2079).

On November 20, 1928, Barnes and Allington returned to Buffalo, accompanied by one of their lawyers and Herbert Markham of Paul H. Davis & Co. (R. 236, 1415, 2168). As a result of this visit, an agreement, dated that day, was entered into pursuant to which Harris, Small & Co. purchased all of the Houde stock from the Cooley syndicate

for the sum of $6,000,000 (Amended Complaint, Ex. B, R. 37-42, 236, 1165-6, 1958-9).

By the time of the aforesaid sale to Harris, Small & Co., Mason, acting upon the prior instructions of Barnes, had caused a corporation, known as the Houdaille Corporation, to be incorporated under the laws of Michigan (R. 204, 236, 1614-5, Ex. P-565). At Barnes' request Mason had also caused to be filed the necessary applications to list the stock of the Houdaille Corporation on the Chicago Stock Exchange and to obtain the approval of the Michigan Securities Commission for the sale of said stock in Michigan. Accordingly, when the sale of the Houde stock was consummated, Harris, Small & Co., pursuant to an agreement with the Houdaille Corporation, transferred and assigned to it all the Houde stock, together with the sum of $480,000, in consideration of which said Houdaille Corporation issued 108,000 shares of its Class A No Par Value Convertible Preference Stock and 148,000 shares of its Class B No Par Value Stock (R. 204-5, Exs. P-427 A-D).

On November 20, 1928, and after the Cooley syndicate had committed itself to deliver the Houde stock, Eastman Dillon entered into an agreement in writing with Harris, Small & Co., whereby it agreed to purchase 36,000 units, consisting of 36,000 shares of Class A and Class B stock of the Houdaille Corporation, being one-third of the stock to be offered to the public, and 10,000 shares of said corporation's Class B stock for the sum of $2,160,000 (R. 242-3, Ex. P-426). Thereafter and upon the issuance of the Houdaille Corporation stock, Eastman Dillon took up and paid for the stock called for in its commitment to Harris, Small & Co. and disposed of it to its customers (R. 241, 242, 2082, 2122, Ex. P-449).

On November 20, 1928, Eastman Dillon and Central Trust Company both received the sum of $15,000 from the Bank by separate checks (Exs. P-186, P-187). In transmitting Eastman Dillon's check, the Bank under date of November 20, 1928, wrote, in part, as follows (Ex. P-86):

> "We are pleased to enclose our check for $15,000, which we are handing you out of our commission for the sale of the Houde Engineering Corporation stock to the New York Car Wheel Company.
>
> "We are doing this not because we feel obligated to do it, but in appreciation of the efforts you made to find a purchaser for this stock, even though, as it worked out, the Manufacturers & Traders-Peoples Trust Company procured the option, and also the purchaser. * * *
>
> "I trust you will feel that we have been generous in connection with the matter."

A letter of similar tenor was written to Central Trust Company (Ex. P-85).

While the letter of transmittal, quoted above, states that the $15,000 remittance was being made "out of our commission", the fact is that the payment was actually made out of the Bank's individual funds since the latter did not receive payment of its commission until December 5, 1928 (R. 1020-1, 1170-1, Exs. P-1, P-166). The evidence, moreover, establishes that said payment was not considered by the parties as a division, equitable or otherwise, of the Bank's commission but was intended, instead, as a voluntary gift on the part of the Bank in recognition of Eastman Dillon's efforts to secure a purchaser for the Houde stock (R. 950, 1418-9, 1420, 2079, 2140-1). It was the then prevailing custom and practice in the investment banking business to make a payment of the kind in question under the

circumstances presented, and it was because of this custom, and for this reason only, that the $15,000 check was sent to Eastman Dillon (R. 237, 1421). The claim made in the petition that Eastman Dillon had demanded payment of this sum and had sought in addition a share of the Bank's syndicate profits (petition, pp. 22, 23) is without foundation and is contradicted by the evidence (R. 950-1, 1418-9, 2079-80).

The Decisions Below.

Upon all of the evidence, including that pertaining to Eastman Dillon as summarized above, the District Court in a well reasoned opinion concluded that petitioners had failed to establish any cause of action against the respondents (R. 177-202, 40 F. Supp. 675). More particularly, the Court held (1) that the agreement of September 26, 1928, Exhibit P-98, constituted an option and that no fiduciary relationship existed between the Bank and the decedent, (2) that even if the Bank should be assumed to have been the agent of decedent, neither the Bank nor any of its co-respondents breached any duty owed to the decedent and were not guilty of any fraud or conspiracy to defraud the decedent, and (3) that any possible cause of action which petitioners might possess was long barred by the statute of limitations. The District Court later supported the determination announced in its opinion by complete and extensive Findings of Fact and Conclusions of Law (R. 202-45), upon the basis of which it duly rendered judgment dismissing the complaints on the merits as to all the respondents (R. 246-7).

Upon appeal by petitioners, the Circuit Court of Appeals, Second Circuit, unanimously affirmed the judgment of the District Court by judgment of affirmance entered on July 6, 1942 (R. 2348). A majority and concurring opinion

were rendered by the Court (R. 2323-2347, 128F. (2d) 889). The majority opinion, written by Judge Clark and joined in by Judge Swan, noted that "After a lengthy trial on the merits the district court rendered a decision finding against the plaintiffs on all points, both of fact and of law" (R. 2325) and that "the writer * * * is of the view that the facts found by the court were supported by the evidence which appears of record, and that from these facts as found the conclusions of the court followed" (R. 2325). Although Judge Frank, in his concurring opinion, disagreed with Judge Clark's acceptance of the findings of the District Court to the extent that said findings related to certain of the acts on the part of the Bank and its officers, he in no way attempted to disturb or impeach the findings made in respect of the other respondents, including Eastman Dillon (R. 2337-47).

While it appears that the majority opinion all but expressly approved the action of the District Court in dismissing the complaints on the merits, and that Judge Frank's views to the contrary were expressly limited by him to the Bank and its officers, the Court as a whole seemingly predicated its affirmance principally on the defense of the statute of limitations (R. 2325). In this connection, the Court ruled that the action was subject to the six-year statutory period of limitation prescribed by Section 48 of the New York Civil Practice Act and that any cause of action of petitioners was accordingly barred.

Summary of Argument.

The issues which petitioners here seek to have reviewed pertain exclusively to the question of the statute of limitations. However, since any issue as to the applicability of the statute of limitations necessarily presupposes the existence of a meritorious cause of action, this Court, unless it is to pass upon a purely hypothetical question, must be satis-

fied that petitioners possess and have established a valid cause of action against respondents.

Inasmuch as the District Court has held, upon the basis of findings which were in no way disturbed by the Circuit Court of Appeals, that petitioners did not prove any cause of action against Eastman Dillon, we should think that this would be a complete answer to the petition so far as Eastman Dillon is concerned. To the extent, however, that this Court may for some reason not feel bound by the findings of the District Court,[5] we shall argue:

I.

Petitioners failed to establish by any competent proof that Eastman Dillon defrauded the decedent or other Houde stockholders or that it was a party to or participated in any conspiracy to defraud the decedent.

II.

Eastman Dillon never received any moneys or property of decedent and at no time incurred any restitutionary liability toward decedent or petitioners.

Since our arguments under Points I and II above will, we believe, convince this Court of the utter lack of merit in the petition, we shall not lengthen this brief by a discussion of the secondary question of the statute of limitations. To the extent that this question might, however, be considered by this Court of some importance so far as Eastman Dillon is concerned, we respectfully beg leave to join in the arguments made in this connection in the brief being submitted on behalf of the other respondents.

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[5] To the effect that this Court will not disturb findings supported by substantial evidence or grant certiorari simply to review evidence or inferences drawn from it, see: *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251; *General Talking Pictures, Inc.* v. *Western Electric Co.*, 304 U. S. 175.

POINT I.

Petitioners failed to establish by any competent proof that Eastman Dillon defrauded the decedent or other Houde stockholders or that it was a party to or participated in any conspiracy to defraud the decedent.

As shown by the opinion of the District Court (R. 198), and as more fully appears from the complaint (R. 7-41), the gravamen of plaintiffs' cause of action is, and of necessity must be, the alleged fraud of the respondents in inducing the decedent to sell his Houde stock.

The proof found in the record is plainly insufficient to establish any fraud or wrongdoing on the part of Eastman Dillon. The evidence pertaining to Eastman Dillon, when reduced to simple and compact form, establishes just this:

Early in 1928, Eastman Dillon unsuccessfully attempted to interest the Houde stockholders in a plan of public financing. In the summer of 1928, it attempted (1) to ascertain the price at which the stock could be bought, and (2) to find a purchaser willing to pay that price. It was unable to find such a purchaser. After Cooley purchased the stock, it considered but abandoned a plan of public financing on his behalf. In November, 1928, it interested Barnes and his associates in Houde. Eventually, Barnes and his associates purchased the Houde stock and, in consideration of the efforts of Eastman Dillon and by reason of its qualifications as a distributor of stock, it was accorded an opportunity to, and did, purchase a one-third interest in the stock of the Houdaille Corporation and subsequently sold the same to the public. In the interim, it received the sum of $15,000 from the Bank "in appreciation of the efforts" theretofore unsuccessfully made by it to find a purchaser for the stock.

The foregoing constitutes Eastman Dillon's sole connection with the entire Houde matter. There is not one circumstance connected with these facts, or for that matter with any of the facts in the case, from which an intent to defraud the decedent can be imputed to Eastman Dillon. The only possible inference which may be drawn from the evidence is that Eastman Dillon in its dealings with respect to the Houde stock at all times acted honestly and with a legitimate and lawful object in view. Eastman Dillon had the right to engage in the business for which it was organized, to wit, the investment banking business. In this connection, it also had the right to solicit new business and, as an incident thereto, to contact prospective customers and make proposals for public financing. Finally, when and if there eventuated a public financing, as was here the case, it certainly had the additional right to participate in the same and make a public offering of stock.

The fact that the decedent happened to be the owner of approximately 46% of the Houde stock does not alter the situation as far as Eastman Dillon is concerned. It was not interested at any stage in acquiring the Houde stock for its own account or in joint account with others, whether owned by the decedent or any one else (R. 2192). It was only interested, as any other investment banker would have been, in the Houde situation as such and the possibility that that situation might present for an opportunity to engage in some form of public financing. Since such an interest was both legitimate and proper, and since the evidence is inconsistent with any other motive or purpose on the part of Eastman Dillon, no fraud or fraudulent intent can possibly be imputed to it.

Shultz v. *Hoagland,* 85 N. Y. 464;
Bernheimer v. *Rindskopf,* 116 N. Y. 428, 436;

Constant v. *University of Rochester,* 133 N. Y. 640, 648.

As stated in this connection by the New York Court of Appeals in *Shultz* v. *Hoagland, supra,* at page 467:

> "The case furnishes no exception to the rule that fraud is to be proved and not presumed. * * * It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. *They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.*" (Italics ours.)

Apparently realizing that there is not the slightest evidence that Eastman Dillon actively and affirmatively defrauded the decedent, petitioners have heretofore sought to fasten liability on that firm on the theory that it in some manner participated in a conspiracy to defraud the decedent. In speaking of this claim of petitioners, the Circuit Court of Appeals in the majority opinion of Judge Clark summarized petitioners' contentions and expressed its views thereon, as follows (R. 2336):

> "It may be added that plaintiffs' claim of conspiracy depends on a highly involved series of inferences, all against the direct findings of the court. They think that a conspiracy of the bank officials and the investment brokers to get possession of the Houde stock, in order to turn it over for large secret profits,

matured as early as July, 1928. Hence with decedent in Europe, and with Chisholm a co-conspirator, the opportunity arose. The Bank was an agent and a fiduciary, but nevertheless was the real purchaser of the stock and Cooley was only a front for the Bank. And hence the 'kickback' arrangement must actually have been made sometime before the claimed sale of October 11 and as a part of the plan. And this conspiracy was carried out by the other steps leading to the disposal of the stock at an advance and division of the profits. And decedent never knew that the Bank, which was actually his agent, was thus constantly working against his interests. *But the evidence does not afford a basis for these deductions, and the district court has found directly to the contrary.*" (Italics ours.)

The District Court and the Circuit Court of Appeals, of course, correctly construed the evidence. The record is absolutely barren of any proof, circumstantial or otherwise, that Eastman Dillon ever attempted or desired to obtain the Houde stock for its own account, much less that it intended to resell the same at a profit. Eastman Dillon was not engaged in the business of purchasing, for its own account, the securities of a going concern. Its business, like that of any other investment banker, was that of assisting its customers in acquiring additional assets or in raising additional capital through a public offering of securities (R. 2060).

In regard to the further contention of petitioners, namely, that the decedent and other Houde stockholders were induced to enter into the agreement of September 26, 1928 (Ex. P-95) and to sell their stock upon false and fraudulent representations of certain of the other respondents, our answer is, first, that, as expressly found by the

District Court, such is simply not the fact (R. 208, 217, 227-8), and secondly, that even if some such representations were made, they were not made at the instance or request of Eastman Dillon and were at no time or in any way countenanced by it. The fact is Eastman Dillon took no part whatever in the negotiations surrounding the procuring of the option and never had any knowledge or notice of the nature or character of the representations made either to the decedent or to the other Houde stockholders (R. 211, 213, 329, 356, 734, 1311-2, 1431). Accordingly, if any fraud was in fact committed in obtaining the option, Eastman Dillon is certainly not liable or accountable therefor. As stated in Cooley on Torts, Volume I, Section 85 (p. 275):

> "* * * where several persons are engaged in the accomplishment of a lawful object, if one or more becomes a tort feasor, even with a view to aid such purpose, the others, who neither direct nor countenance such tortious act, are not liable."

Considering plaintiffs' charges of conspiracy as a whole, the best and most convincing evidence that Eastman Dillon was at no time engaged in a common design or effort to obtain the Houde stock for the joint account of itself, the Bank and Central Trust Company, and had no such purpose in view when it suggested the obtaining of an option, is that it did not participate in any manner in the Cooley purchase (R. 213, 216, 221, 1434, 2147), that it unequivocally declined to go forward with the Cooley financing (R. 228, 949-50, Ex. P-74), that it did not participate, directly or indirectly, in the syndicate thereafter formed to purchase the stock from Cooley (R. 230, 1178-80, 1431-3, 1914-5, 1961-2), and that neither the Bank nor Central Trust Company in any way participated with it in the Houdaille financing (R. 242). Petitioners cannot explain away these facts.

POINT II.

Eastman Dillon never received any moneys or property of decedent and at no time incurred any restitutionary liability toward decedent or petitioners.

While the instant action was at all times up to and including the close of the trial prosecuted and considered by all the parties concerned, including the District Court, as essentially an action for fraud and deceit (R. 198), petitioners have since asserted that proof of fraud was unnecessary to their cause of action and that liability might be imposed upon Eastman Dillon on the theory that it in some manner came into possession of property of the decedent, knowing or being chargeable with the knowledge that such property had been derived from a breach of trust, and that it should, accordingly, be required to disgorge the profits allegedly realized therefrom or respond in damages therefor.

Any possible liability on the part of Eastman Dillon on this theory of recovery is of necessity predicated upon the following hypotheses, viz.: (1) that the Bank undertook to and did act as the decedent's agent in the sale of his Houde stock; (2) that the Bank, through the guise of an apparently *bona fide*, but utterly fictitious, sale of all the Houde stock to Cooley, and later by becoming a participant in the syndicate formed to acquire such stock, obtained an interest in the subject matter of its agency in violation of its duties as decedent's agent; (3) that Eastman Dillon knew or was chargeable with knowledge of all of the foregoing facts, including the fact that the sale of the Houde stock to Cooley was purportedly nothing more than a sham; and (4) that with such knowledge Eastman Dillon became the transferee

of property thus derived from the decedent. Unless each and every one of the aforesaid propositions is substantiated by a fair preponderance of the evidence, it is obvious that no cause of action for restitution or damages was or could be made out against Eastman Dillon. We believe that plaintiffs' failure to sustain this burden of proof is patent.

There is absolutely no proof that Eastman Dillon ever received any moneys or property of the decedent. The Houde stock, about which these lawsuits have been built, never came into Eastman Dillon's possession or control nor did it at any time acquire or purport to acquire title thereto. On the contrary, all of such stock was purchased and acquired by Harris, Small & Co. from the Cooley syndicate for the sum of $6,000,000 and was by it transferred (together with $480,000 in cash) to the Houdaille Corporation of Michigan in exchange for 108,000 shares of Class A Stock and 148,000 shares of Class B Stock of that corporation (Amended Complaint, Ex. B, R. 37-42, Exs. P-427A-D). Pursuant to the agreement in writing of November 20th between Harris, Small & Co. and Eastman Dillon, the latter thereafter purchased and acquired 36,000 shares of said Class A and 46,000 shares of said Class B stock of the Houdaille Corporation from Harris, Small & Co. for the sum of $2,160,000 cash[6] (Ex. P-426). To the extent, therefore, that petitioners would imply that Eastman Dillon received any of the decedent's Houde stock, their claim is manifestly without foundation.

As to the $15,000 received by Eastman Dillon from the Bank on November 20, 1928, any claim that said sum constituted property of the decedent must of necessity be

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[6] Under the circumstances at hand, Eastman Dillon clearly became a *bona fide* purchaser for value of the Houdaille stock acquired by it. N. I. L. §§91, 95.

predicated on the proposition that such sum of $15,000 represented a portion of the moneys paid by the decedent to the Bank as part of its commission on the sale of the Houde stock. The difficulty with this proposition is that it is not only unsupported by but contrary to the evidence. The Bank's total commission upon the sale of all the Houde stock amounted to $126,318.33 (R. 26). This sum was paid to it on or about December 5, 1928 (R. 1020-1, 1170-1, Exs. P-1, P-166). Since this was some fifteen days after the date of the $15,000 payment to Eastman Dillon, it is obvious that such payment could not have been made out of the Bank's commission but necessarily came out of the Bank's own funds. In addition, it appears that of the total commission paid to the Bank, less than 47% thereof, or $58,270.89, was paid by the decedent (Amended Complaint, R. 29-30). The balance of $68,047.44 represents the commission paid by the other Houde stockholders and, so far as these lawsuits are concerned, must be deemed to have been properly received by the Bank under the decision rendered in *Shultz* v. *Manufacturers & Traders Trust Co.*, 254 App. Div. 128 (4th Dept.), aff'd, 279 N. Y. 781. Assuming, therefore, but not conceding, that the sum of $15,000 received by Eastman Dillon was paid to it out of the Bank's commission, there is no more reason to believe that the Bank used the portion of such commission paid by the decedent than the portion contributed by the other stockholders. In fact, if petitioners are correct in their contention that the portion of the commissiou paid by the decedent was improperly received by Bank and became impressed with a trust for the decedent's benefit, the presumption (created as a matter of law) is that the Bank in making payment of said $15,000 to Eastman Dillon necessarily used

its own funds and no portion of the moneys paid by the decedent as a commission.

Importers and Traders Nat. Bank v. *Peters*, 123 N. Y. 272, 278;

Matter of Holmes, 37 App. Div. 15, 20 (3rd Dept.), aff'd, 159 N. Y. 532;

Clarke v. *Public Nat. Bank & Trust Co.*, 259 N. Y. 285;

Bonham v. *Coe*, 249 App. Div. 428, 435 (4th Dept.), aff'd, 276 N. Y. 540.

The claim of petitioners is subject to the further fatal objection that they have failed to establish any agency or violation of duty on the part of the Bank towards decedent. In the brief being submitted on behalf of the other respondents, it is demonstrated that in the light of all the evidence the relationship between the decedent and the Bank must be deemed to have been that of optionor and optionee and not that of principal and agent. It is also shown that irrespective of the precise legal relationship which may have existed between the Bank and the decedent—whether that of principal and agent or not—there had in no event been any breach of fiduciary duty toward the decedent. Since we fully concur in the arguments and points of law upon these issues, as set forth in said brief, any discussion of such issues in this brief would simply be repetitious and unnecessarily burdensome to this Court. We shall, accordingly, proceed to a consideration of the further question presented, namely, that of Eastman Dillon's knowledge or lack of knowledge of any agency relationship which might be assumed to have existed between the Bank and the decedent and any possible breach thereof.

Since the decedent was in Europe at the time of the execution of the instrument of September 26, 1928 (Ex. P-98), and was not present at any of the negotiations leading up to the execution thereof, petitioners must necessarily rest their claim that the Bank became decedent's agent upon the long cablegram, Exhibit P-105a, which was sent to him by Chisholm on October 2, 1928. With respect to this cablegram, the District Court affirmatively found, and the unquestioned fact is, that Eastman Dillon not only did not participate in the dispatch of said cablegram but did not even know of the existence thereof—not to mention its contents (R. 213, 737, 1319-21, 1380-1). It is evident, therefore, that if any alleged agency on the part of the Bank arose out of the cablegram of October 2nd, Eastman Dillon was not, and could not have been, aware thereof.

In this connection, it is significant to observe that Buffington and Rea, in their discussions and correspondence antedating the instrument of September 26th, spoke only in the terms of option, not agency (R. 208, 1386-8, 1474-5, 2059-60, Exs. P-55, P-57, P-61, P-62, P-66). An option is what Buffington suggested be obtained and that is what he anticipated would be obtained. He neither suggested nor requested anything else. If, under these circumstances and as petitioners maintain, the Bank undertook to obtain an agency instead of an option, it is clear that it did so without the knowledge, consent or approval of Eastman Dillon. It is also clear that if the Bank thus actually did undertake to act as decedent's agent its knowledge in that respect can not be imputed to Eastman Dillon.

Weisser v. *Denison*, 10 N. Y. 68;
Taylor v. *Commercial Bank*, 174 N. Y. 181;
Corrigan v. *Bobbs-Merrill Co.*, 228 N. Y. 58, 69.

Turning to petitioners' claim that the sale of the Houde stock to Cooley was not a *bona fide* one but only a sham, the answer, assuming petitioners' contention to be correct, is that such fact was completely unknown to Eastman Dillon. The proof shows that Eastman Dillon in no way participated in the negotiations which resulted in the sale to Cooley (R. 213, 216, 1434, 2147) and that it was not even informed thereof until October 15, 1928—some five days after Cooley had agreed to buy the stock (Ex. P-402). In addition, Eastman Dillon at no time knew that Cooley was a director of the Bank (R. 237, 2152) and was also unaware that the Bank had financed his purchase (R. 216, 227, 2151).

From the petition it appears that petitioners, in referring to the sale to Cooley, place considerable emphasis upon two instruments or memoranda, dated October 11 and October 13, 1928, respectively, which are known in these suits as Exhibits P-112 and P-113. In fact, petitioners go so far as to state that these memoranda constitute the "core" of their case and that "without them neither decedent nor petitioners had cause for complaint" (petition, p. 15). Assuming that everything which petitioners say about these memoranda is true and that they are to be accorded the significance sought to be attached to them, the all dispositive answer so far as Eastman Dillon is concerned is that it was not a party to either of said memoranda, had no part in the discussions leading up to their preparation and never knew of their existence or of the understandings therein expressed (R. 214-6, 219-21, 2151-3).

It appears from the instrument of October 13, 1928, the provisions of which are set forth at length at pages 219-221 of the record, that, under certain contingencies, the parties thereto contemplated the formation of an underwriting syndicate in which certain parties they might agree upon,

including Eastman Dillon, would be permitted to participate. Harriman, the President of the Bank and one of the parties named in said instrument, when questioned concerning the insertion therein of the name of Eastman Dillon, testified that at no time either prior or subsequent to October 13, 1928 had he discussed the matter of the participation of Eastman Dillon in the proposed syndicate with any member of that firm, or with Buffington, that neither Rea, Wurst nor Cooley (the other parties concerned) had said that they had had any such discussion with any one associated with Eastman Dillon, that he knew of no request by Eastman Dillon, or Buffington, for an opportunity to participate in such syndicate, and that no such request had been reported to him by Rea, Wurst or Cooley (R. 1178-9). He further stated that Eastman Dillon never had any interest whatever in the syndicate which was subsequently formed by Cooley on or about November 1, 1928, or any interest in the share in that syndicate of the Bank and its affiliate, Western New York Investors, Inc., and that at no time did the Bank or Western New York Investors, Inc. agree to divide, or actually divide, any part of their syndicate profits with Eastman Dillon (R. 1178-80). Rea, Cooley and Wurst, each questioned along the same lines, testified similarly (R. 1431-3, 1914-5, 1961-2).

Under the above circumstances, it seems obvious that if the decedent, who became a member of the Cooley syndicate, was unaware, as petitioners contend, of the circumstances purportedly stigmatizing the sale to Cooley as a fictitious one, Eastman Dillon, who concededly had no connection with such syndicate, did not and could not have known of the same and was justified in believing that said sale was in all respects *bona fide* and proper.

Conclusion.

So far as Eastman Dillon is concerned, no question is presented for review by this Court and the application for a writ of certiorari should be denied.

Respectfully submitted,

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